Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-526

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD, WELLINGTON G. RIGBY, and NEW YORK TELEPHONE COMPANY,

Respondents.

RESPONDENT NEW YORK TELEPHONE COMPANY'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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On July 21, 1975, the United States Court of Appeals for the Second Circuit unanimously denied a petition for review filed on behalf of petitioner, Local 1104, Communications Workers of America, AFL-CIO ("CWA"), and its sister local, Local 1101, and granted the National Labor Relations Board's ("Board") cross application for enforcement. The New York Telephone Company ("Telco.") was the successful charging party in the Local

1101 case before the Board. The charges against Local 1101 and petitioner Local 1104 were consolidated before the Board. A single petition for review (Second Circuit Docket No. 74-2044) and a single petition for enforcement (Docket No. 74-2230) were filed. Telco., as a successful charging party as well as the employer of respondent Wellington G. Rigby ("Rigby"), was granted permission to intervene and to participate fully in both cases before the court below.

Question Presented

The court below correctly determined that Locals 1104 and 1101 committed unfair labor practices in seeking the discharge of employees for failing to pay dues, while denying to them full union membership. The employees in both cases engaged in protected activity which the petitioner and Local 1101 found objectionable. The court below stated the applicable principle as follows:

> "Where, as here, the denial of full membership was not for the failure to pay dues, but rather for engaging in protected activity, the union's attempt to invoke the agency shop clause violates §8(b)(1)(A) and §8(b)(2)" (P.A. 15a-16a).[1]

The question presented therefore is whether a union may, under the guise of an agency shop clause, compel the discharge of employees who refused to pay dues where the union denied to them full membership for exercising protected rights under the Labor-Management-Relations Act ("Act").

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[1] Citations to the Appendix submitted by Petitioner will be noted by P.A. followed by the appropriate page numbers in parenthesis.

Statement of the Case

The court below examined the underlying intent and purpose of the Act and resolved a basic conflict in favor of employees' Section 7 rights and against a union's attempt to quash those rights under the guise of union security.

In the case which is a subject of this petition for a writ, the Board held that Local 1104 violated sections 8(b)(1)(A) and 8(b)(2) by seeking the discharge of employee, Rigby, under the Agency Shop provisions of the collective bargaining agreement for failing to pay dues while denying to him membership. He was denied membership solely because of his organizational activities on behalf of a rival union conducted while he was not a member of Local 1104 and prior to his application for memership (A54a).[2] Rigby was otherwise qualified for memership. During the '71-'72 Telco strike, he honored the CWA picket lines.

In the case involving Local 1101, which was not included in this petition, the Board similarly held that sections 8(b)(1)(A) and 8(b)(2) of the Act were violated when Local 1101 sought the dismissal of other employees of Telco for failing to pay dues, under the same Agency Shop provision of the agreement, while denying to them membership. Membership was denied because these employees exercised their rights guaranteed by the Act and crossed CWA picket lines during the '71-'72 strike while they were not members of Local 1101. In both cases, the employees involved applied for member-

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[2] This fact was stipulated to by Local 1104 and the General Counsel. Numbers in parentheses preceded by the letter A refer to pages in the Joint Appendix in the Court of Appeals which petitioner has requested that Court to certify to this Court.

ship after the strike and remained willing to pay dues and initiation fees as full members.

The CWA is the collective bargaining representative for employees in a number of separate bargaining units in the Bell System. Since 1961, it has represented Telco's plant department and certain other employees in one bargaining unit.

Petitioner Local 1104 and Local 1101 are constituent locals of the CWA, operating within designated jurisdictions of the Telco bargaining unit.

The Board has held in *Communications Workers of America, AFL-CIO (New York Tel. Co.)* 208 NLRB No. 32, 85 LRRM 1104 (1974) that the CWA strike of '71-'72 was in violation of sections 8(b)(3) and 8(d) of the Act. This, however, was not the basis of the decision of either the Board or the Court below. Both decisions were based on the fact that the employees, including Rigby, engaged in protected activities for which reasons Locals 1104 and 1101 denied them membership.

The collective bargaining agreements prior to the one agreed to in February 1972, which is the subject of this proceeding, had neither a Union Shop nor an Agency Shop provision. They contained only maintenance of membership dues clauses (A74a). Membership, which continued to grow during those years, had always been voluntary. In February 1972, for the first time in the collective bargaining relationship between Telco and the CWA, an Agency Shop provision was placed in the agreement. That clause provided in material part as follows:

> "33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974 both dates inclusive" (A75a).

Statute Involved

Labor-Management Relations Act—Relevant Sections

Sec. 1(b):

> "Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations *each recognize under law one another's legitimate rights in their relations with each other,* and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.
>
> "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, *to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce,* to define and proscribe practices on the part of labor

and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce" (emphasis supplied, 29 U.S.C. sec. 141(b)).

Sec. 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title" (29 U.S.C. sec. 157).

Sec. 8(a):

"It shall be an unfair labor practice for an employer—

• • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

• • •

". . . Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization . . .

• • •

"(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ." (29 U.S.C. §158(a)(3)).

Sec. 8(b):

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . ." (29 U.S.C. sec. 159(b)(A)).

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as to condition of acquiring or retaining membership; . . ." (29 U.S.C. sec. 158 (b)(2)).

Summary of Argument

It is respectfully submitted that the CWA's right to self-defense or self-preservation is not in issue in this case. What is at stake is the employees' ability to exercise fundamental rights guaranteed by Congress free of the coercion inherent in the threat of loss of employment. The decision of the court below in favor of these rights

would neither impair the CWA's existence nor hamper its so-called right to self-defense.

Significantly, for over eleven years the CWA maintained a viable collective bargaining relationship with Telco and increased its membership without either a Union Shop or an Agency Shop. Even the minimal hard core financial membership belabored over in this petition was not required. "Free rides" historically were permitted. No factual bases exist for the claim that the CWA's existence is threatened because of Rigby's free ride.

In determining the substantial issue raised, the court below was mindful of what Local 1104 had attempted: it was not content to merely deny membership to Rigby to protect its existence. Instead, it attempted to enlist the aid of the employer to punish a former member by the threat of loss of employment. In effect, the petitioner sought to reinstitute the evils of compulsory unionism under the guise of an Agency Shop clause—the very activity Section 8(b)(2) intended to prohibit.

The employee had an unwelcome Hobson's choice. He either gave up the right to organize for a union of his choice or lose his right to full membership in the CWA while still having to pay dues, because he is no longer protected by the Act.

As shall be demonstrated, none of the points raised by petitioner is worthy of consideration at this stage in the history of the Act and labor relations. The Court of Appeals' determination was persuasively reasoned and exhaustive. It was consistent with the clear language of the Act, legislative history and applicable judicial precedent, and the fundamental purposes of National Labor policy.

Reasons for Denying the Petition

In arriving at its decision, the court below relied in substantial part on the language of Section 8(b)(2), which makes it an unfair labor practice for a labor organization to

> ". . . cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated *on some ground other than this failure to tender the periodic dues . . .*" (emphasis added, 29 U.S.C. § 158(b)(2).)

The petitioner argued that as long as a union permitted an employee to pay dues, even though he was denied membership for engaging in an acknowledged protected activity, Section 8(b)(2) was satisfied. The court below rejected this argument on the grounds that it was neither in accord with the language of 8(b)(2) nor the underlying Congressional intent. The court stated that Congress by permitting Union Shops, wanted not only to protect unions from free riders but also to minimize the abuses of compulsory unionism. Section 8(b)(2) circumscribed the grounds on which a union could invoke union security to seek an employee's discharge. If an employee is denied membership for reasons other than the refusal to pay dues, the union may not cause the employer to discriminate against the employee.

The court below noted that the petitioner's argument would, in effect, read out of the Act the notion of a reason other than the failure to pay dues. The court stated:

> ". . . We hold, therefore, that in order to give meaning to the 'other than his failure to tender periodic

dues' clause of § 8(b)(2), we must look to the reason for denial of full membership, not the reason for denial of financial core membership.' Where, as here, the denial of full membership was not for the failure to pay dues, but rather for engaging in protected activity, the union's attempt to invoke the agency shop clause violates § 8(b)(1)(A) and § 8(b)(2), *NLRB* v. *Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953)." (P.A. 15a-16a)

The court's interpretation of the intent of the section finds ample support in the history of the Act. In *Union Starch & Refining Company*, 87 NLRB 799 (1949), *enforced* 186 F.2d 1008 (7th Cir. 1951), *cert. denied* 342 U.S. 815 (1951), where the Board declared unlawful another union attempt to foster compulsory unionism by way of a union-shop clause, the right of an employee to refrain *at his option* from becoming a full member under a union-shop clause was upheld by the Board, which decision was enforced by the Seventh Circuit Court of Appeals. The employee had the option of either full membership or merely financial-core membership. The Board stated:

> "Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop." (87 NLRB at 784.)

The Seventh Circuit deferred to the expertise of the Board in the matter of labor relations and stated that its interpretation was in harmony with the purpose of Congress to prevent utilization of union-security agreements except to compel payment of dues and initiation fees. (186 F.2d at 1012.)

That the intent of Congress was to eliminate the evils of compulsory unionism is evident from the following remarks of Senator Taft made during the debate on Section 8(a)(3):

> "I merely wish to say that of course many persons believe that the union shop, which is the usual form of closed shop, should be absolutely prohibited. The committee did not feel that it should go that far, but the committee felt that if it permitted a union shop agreement which provided that every man must be a member of the union, then the union must be reasonable, must accept as members all who apply for membership, and must accept then on the same terms as it applies to other members, and must permit them to remain in the union if they are willing to pay their dues. In other words, the position of the committee was this: Either we must have an open shop or we must have an open union. We cannot have both." *II Legislative History of the Labor Management Relations Act, 1947*, 1096 (GPO 1948).

This basic purpose was also recognized by this Court in *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967), which upheld a union's right under Section 8(b)(1)(A) of the Act (29 U.S.C. § 158(b)(1)(A) to fine members who violated a legitimate union rule governing membership. This Court, however, noted the explicit wording of Section 8(b)(2) in contrast to the imprecise language of Section 8(b)(1)(A), and stated that:

> "Section 8(b)(2) limits union power to compel an employer to discharge a terminated member other than for 'failure [of the employee] to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.'" (388 U.S. at 184)

This Court stated further:

> ". . . It is significant that Congress expressly disclaimed in this connection any intention to interfere with union self-government or to regulate a union's internal affairs. The Senate Report stated:
>
> 'The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and *do not require the employer to inquire into the internal affairs of the union.*' S. Rep. No. 105, 80th Cong., 1st Sess., 20, I Legislative History of the Labor Management Relations Act, 1947 (hereafter Leg. Hist.) 426. (Emphasis supplied.)

Senator Taft, in answer to protestations by Senator Pepper that § 8 (b)(2) would intervene in the union's internal affairs and 'deny it the right to protect itself against a man in the union who betrays the objectives of the union . . .,' stated:

> *'The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, *and they still will be able to try any of their members.* All that they will not be able to do, after the enactment of this bill, is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion."[13] (Emphasis supplied.)

> Section 8 (b)(1)(A) was under consideration when Senator Taft said this. Congressional emphasis that § 8 (b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8 (b)(1)(A) as contemplating regulation of internal discipline. . . ." (388 U.S. at 185)

It is obvious from the foregoing that the central premise of national labor policy is *not* the protection of strong labor unions for purposes of collective bargaining or collecting dues, as petitioner would have this Court believe. The very thrust of the development of national labor policy has been in the direction of increasing the protection of fundamental rights of individual employees against the encroachment of both employers and overreaching unions. Thus, the *Wagner Act,* originally directed solely at employer conduct, was amended by *Taft-Hartley* in 1947, to include the protection of individual employees against unlawful union behavior. *Landrum-Griffin* was passed to further insure the protection of individual rights by requiring internal union democracy.

In *NLRB* v. *Schwartz,* 146 F.2d 773 (1945) the Fifth Circuit observed:

> "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union." (Emphasis in original, at 774)

In the Act itself Congress declared in section 1 its purpose and policy to be in part ". . . to protect the rights of individual employees in their relations with labor organizations. . . ." (29 U.S.C. § 141(b))

The very first words in Section 7 of the Act are "Employees shall have the right to . . ." not "Unions shall have the right to". Moreover, Section 7 expressly states that employees shall have the right to form, join or assist labor organizations or "to refrain from any or all of such activities." (29 U.S.C. § 157)

It must be emphasized that the employee Rigby, who was not a member of the CWA at the time he attempted unsuccessfully to organize for a rival union, was engaged in a protected activity. The right of petitioner to reject his membership application did not make Rigby's activity unprotected. Nevertheless, the right of a union to reject the application was not questioned. What the court below questioned, however, was the petitioner's right to jeopardize the livelihood and right to a job of an employee who was not a member of the petitioner, simply because he supported a rival union—a protected activity.

The decision of the court below is supported by this Court's decision in *NLRB* v. *General Motors*, 373 U.S. 734 (1963), where it was held that the agency shop was a form of union security permitted by Congress. What was declared lawful, however, was an agency shop that gave employees the option of becoming either full members or financial core members.

It was expressly noted that this employee option served the Congressional purpose of eliminating the evils of compulsory unionism. This Court stated:

> "*The agency shop arrangement proposed here removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop.* Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes, it is more formal than real. *To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent.*" (emphasis added, 373 U.S. at 744).

The petitioner's view of the agency shop in this case is identical to the position recommended by the employer in *General Motors, supra,* in its attempt to persuade this Court that the agency shop was unlawful. The employer there claimed that under the agency shop, the union had the right to deny membership while demanding payment of dues. This Court rejected that interpretation of the agency shop and stated that where the option is given to the employee, the evils of compulsory unionism are reduced (373 U.S. at 774). By implication, this Court recognized that petitioner's interpretation of a union's rights under an agency shop would tend to foster the evils of compulsory unionism.

If the petitioner were to prevail here, the option favored in *General Motors, supra,* would not be available to employees. Unions would be open to everyone except those employees who exercised fundamental rights guaranteed by the Act. The evil of compulsory unionism would be given free license.

Moreover, we would be confronted with an anomolous situation. Under the established principles of *Union Starch, supra,* in which case this Court denied certiorari, the employee has the option of joining or tendering dues where a union shop exists. Under an agency shop, pre-

sumably a more liberal form of union security, this *option* would not be available to the employee. This could not have been intended by this Court in *General Motors*. This is clear from this Court's decision in *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746 (1963), which was decided the same day as the *General Motors* case, which stated that:

> "It follows that the *General Motors* case rules this one, for we there held that the 'agency shop' arrangement involved here—which imposes on employees the only membership obligation enforceable under § 8(a)(3) by discharge, namely, the obligation to pay initiation fees and regular dues—is the 'practical equivalent' of an 'agreement requiring membership in a labor organization as a condition of employment.'" (373 U.S. at 751.)

There is no basis in fact for petitioner's argument that union dues pay only for the role of representing the employee in collective bargaining. The dues that Rigby would be called upon to pay without any of the rights of a member are the exact equivalent of those dues union members must pay. As this Court noted in *Retail Clerks, supra,* (footnote 6), quoting from the union's brief in that case, union dues are used to promote or defeat legislation, to publish newspapers, to finance litigation, to provide scholarships and free tuition, and to do a host of other things that members authorize. (373 U.S. at 753.) On the other hand, the right to full membership in a union, the destruction of which petitioner seeks to have this court sanction, is a substantial right. It includes the right to vote for union officers who make policy, as well as to ratify or vote against union-negotiated contracts. The free ride given to Rigby is compensation for denying to him the substantial rights of union membership. To compel him to pay dues without membership-rights would sanction

a particularly abhorent form of taxation without representation not authorized by the Act.

The court below disposed of the "free rider," argument when it stated that the only free riders will be those who, like Rigby, are lawfully excluded from the union for engaging in "disloyal" but nevertheless protected activity. Although the court felt that the inroad on a union's ability to protect itself from free riders was not serious it stated that a decision to the contrary "would create far greater problems of compulsory unionism." (P.A. 19a.)

The principles reaffirmed by the court below had been previously followed by the Board in *United Steel Workers of America, Local 4186 (McGraw Edison Co.),* 181 NLRB 992 (1970), which decision was not challenged in court by the Steel Workers Union, the party affected most by decision in that case.[3]

Essentially, *McGraw Edison* held that it is unlawful coercion for a union to enforce an otherwise valid Union security clause while denying full membership rights to employees where such enforcement serves to discourage an employee from exercising a fundamental right guaranteed by the Act.

In that case, the employee had previously filed a decertification petition with the Board. The employee was forbidden by the Union for one year to attend meetings, and for an indefinite period, to hold office. The employee refused to pay dues and the Union threatened to obtain his discharge.

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[3] It should be noted that the *Steel Workers,* a major union, has been in the forefront of labor unions' efforts for the preservation of their prerogatives.

The Board was not dealing with the Union's right to discipline a member by fining or expulsion, and observed that the impairment of membership rights by itself was not necessarily unlawful. It was the insistence of payment of dues upon penalty of discharge while membership was impaired that constituted the unlawful conduct.

The Board stated:

> "We see no justification, either in the proviso to section 8(b)(1)(A) *or in considerations of a labor organization's need for self preservation, for the steps taken against Blaine. The threat to enforce the union security clause while continuing the sanctions against Blaine was hardly necessary to preserve the Union's existence* as an institution, *nor could it be viewed as a noncoercive form of internal discipline which would have no discouraging effect upon a member's decision to invoke the Board's representation procedures.*" (Emphasis added, 181 NLRB at 992).

Even where the most direct attack on a union's existence was made,—a decertification petition,—an employee's fundamental right under the Act took precedence.

The rights of the individual were again upheld by the Board in *Communications Workers of America,* 9505 (*Pacific Tel. & Tel.*) 193 NLRB 83 (1971). There, an employee, *while a member of the CWA,* had distributed membership cards and literature in the name of a rival labor organization. The Board referred to this as decertification activities, though the employee did not actually file a decertification petition. He was expelled from the CWA. After he refused to continue to pay dues, the CWA demanded his discharge under a contract clause conditioning employment on the payment of dues. The

Board, citing *McGraw Edison, supra,* held this to be a violation of sections 8(b)(1)(A) and (2) of the Act.

The employee's activity in that case was in no way different than that engaged in by Rigby except that Rigby was not a member of the CWA when he attempted to organize on behalf of the Teamsters. Indeed, the petitioner's right here to discipline him is even more tenuous because he was not a member.

If a primary function of the Board is to protect rights guaranteed by section 7 of the Act, then concededly, unless an employee has unimpeded access to the Board those rights are meaningless. It would seem to be equally appropriate to protect the employee's exercise of fundamental rights even before he attempts to gain access to the Board. This was recognized implicitly in *Pacific Tel. & Tel., supra,* when it protected the employee's right to distribute literature and cards on behalf of a rival union as a preliminary step to a decertification petition that was never filed. Unless the right is protected, *ab initio,* then the employee's unimpeded access to the Board would be ineffectual.

The decision of the court below is not in conflict with decisions of any other Circuit Court of Appeals. As the court below noted, the case of *NLRB* v. *Hershey Foods Corp.,* 513 F.2d 1083 (9th Cir. 1975) cited by petitioner, is not inconsistent. In that case, the issue was not whether an employee may be compelled to pay dues where he was denied membership, but whether or not the employee may be compelled to become a full member against his wishes. In other words, the issue is similar to the issue determined years ago in *Union Starch, supra.* The court below noted that the principle followed in *Hershey Foods* is consistent with its own decision. The court stated:

> "... [T]he rule resulting from a combination of the two cases would appear to be that, although a union, even under a union shop clause, cannot compel any greater degree of membership than financial core membership, it must nonetheless, even under an agency shop clause, grant full membership to those employees who desire it if it wants to retain its right to receive their dues." (P.A. 16a, footnote 8.)

CONCLUSION

The decision of the court below follows naturally from this Court's decision in *General Motors* and the principle established in *Union Starch, supra.* This Court denied certiorari in that case.

For all the reasons set forth above, the Petition for a Writ of Certiorari should in all respects be denied in this case also.

Respectfully submitted,

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